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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

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The National Association of Regulatory Utility Commissioners hereby submits its brief as *amicus curiae* in support of the petition for certiorari filed by the Commissioner of Transportation of the State of New York seeking review of the decision of the United States Court of Appeals for the Second Circuit in *Commissioner of Transportation v. United States*, 750 F.2d 163 (2d Cir. 1984) (attached as Appendix A to the Petition for Certiorari filed herein). Pursuant to Rule 36 of this Court, the written consents of the parties have been obtained and filed with the Clerk.

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The New York State Department of Transportation (NY DOT) is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating motor carriers within their respective borders. As such, these officials have the obligation to assure the establishment of motor carrier services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of their respective legislature, established to regulate carriers operating within their respective jurisdictions.

The decision of the Court of Appeals for which petitioner seeks review affirmed a decision of the Interstate Commerce Commission (ICC of the Commission) preempting an order of the NY DOT which denied Greyhound Lines, Inc. the authority to increase passenger fares over intrastate routes in the State of New York. (The ICC's decision is attached as Appendix B to the Petition for Certiorari). Acting pursuant to the recently-enacted section 17 of the Bus Regulatory Reform Act of 1982 [codified at 49 U.S.C. § 11501(e) (Supp. 1983)], the ICC authorized the carrier to increase its intrastate fares by 40

percent despite previous findings of the NY DOT after notice, hearing and investigation, that such higher fares were not in the public interest. (The NY DOT's decision is attached as Appendix C to the Petition for Certiorari.)

In affirming the Commission, the Court of Appeals held that the ICC's decisions regarding intrastate bus fares need not meet the heightened standard of review required by this Court's decision in *North Carolina v. United States*, 325 U.S. 507 (1945) concerning intrastate rail rates. Because the statutory authority for the ICC's preemption decisions under section 11501(e) is virtually identical to the statute employed in *North Carolina* the NARUC is vitally concerned that the Court of Appeals' decision will permit the ICC to preempt State bus decisionmaking without the necessary care and certainty required in the rail area. Because the ICC frequently and consistently preempts State bus fare decisions (see Appendix F to the Petition for Certiorari) without meeting the *North Carolina* test, the fare orders of each member of the NARUC with jurisdiction over bus regulation are threatened by the Court of Appeals' decision.

SUMMARY OF ARGUMENT

The issue presented the Court in ths case which is of greatest concern to *amicus* NARUC is whether the standard of judicial review described by this Court in *North Carolina v. United States,* 325 U.S. 507 (1945) shall apply to the ICC's decision preempting State ratemaking decisions under Section 17 of the Bus Regulatory Reform Act of 1982, Pub. L. 97-261, 96 Stat. 1102 *et. seq.* (1982) (the Bus Act.).[1] In *North Carolina*, the Court held that ICC

[1]Section 17 of the Bus Act is codified at 49 U.S.C. § 11501(e) (Supp. 1983). All subsequent references to section 17 shall be to this U.S. Code Citation.

decisions preempting State rail rate decisions "must meet 'a high standard of certainty' " in which the "justification for the 'exercise of the federal power must clearly appear'." 325 U.S. at 511. Because the ICC's authority to preempt State bus fare decisions under 49 U.S.C. § 11501(e) is virtually identical to the statutory scheme under review in *North Carolina,* this vigorous standard must also apply in the intrastate bus area.

On this issue of first impression, the Court of Appeals rejected arguments that *North Carolina* was applicable to the Commission's decision to preempt the NY DOT. Because the basic reasons for the exercise of the federal power in the field of intrastate bus regulation are the same in the area of rail regulation, and because the statutory authority with regard to these two transportation modes are so similar, this rejection of *North Carolina* is error. Due to the dire impact the Court of Appeals' appeal will have on all State bus decisionmaking, this Court should grant the Petition for Certiorari and then reverse.

ARGUMENT

Certiorari Should be Granted to Review the Lower Court's Decision Conflicting with This Court's Decision in North Carolina v. United States.

Prior to the 1982 enactment of the Bus Act, the jurisdiction of the Commission to regulate the rates of motor carriers of passengers extended only to the interstate operations of such carriers. Under 49 U.S.C. sec. 10521(b) (Supp. 1981), the ICC was specifically and explicitly denied authority, *inter alia*, to interfere in State regulation of intrastate motor carrier matters. 49 U.S.C. § 11501(e) (Supp. 1983) altered this bright line between State and Federal jurisdiction by authorizing the ICC to act in this

area of regulation. Specifically, Congress directed the ICC to grant a carrier the authority to increase intrastate fares when the ICC determines *inter alia*, "that the rate, rule or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." 49 U.S.C. § 11501(e)(1)(B) (Supp. 1983).

This legal test for the exercise of the ICC's intrastate fare setting authority ("the unreasonable burden on interstate commerce standard") is the jurisdictional test established by the United States Supreme Court in its so-called *Shreveport* decision. *Houston E. & W. T.R. Co. v. United States,* 235 U.S. 342 (1914). In *Shreveport*, the Court held that the authority of Congress to regulate interstate railroad commerce under the Constitution necessarily includes the power to regulate intrastate transactions which unduly burden, discriminate against or otherwise harm interstate activities:

> Wherever the interstate and interstate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the States, that is entitled to prescribe the final dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the States and not the nation, would be supreme within the national field.
>
> 234 U.S. at 351-352.

This principal – that Congress, through its agent, the ICC, could regulate those intrastate activities which harmed interstate commerce – governed ICC jurisdiction over intrastate rail matters for over 60 years, until the enact-

ment of the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1913 (1980).[2]

In *Shreveport,* however, the Supreme Court was careful to note that its decision did not grant the ICC plenary authority to regulate intrastate commerce in the absence of a finding of unduly burdensome or discriminatory intrastate practices. 234 U.S. at 357. Indeed, in a later decision, this Court revisited its *Shreveport* decision, holding that the power of the ICC to interfere in intrastate matters should not be lightly exercised. In *North Carolina v. United States,* 25 U.S. 507 (1945), the Court stated in the context of an intrastate rail rate dispute that "a State's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by [the *Shreveport* doctrine]." 325 U.S. at 511. More specifically, the the Court went on to hold that:

> Intrastate transportation is primarily the concern of the State . . . A scrupulous regard for maintaining the power of the State in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet "a high standard of certainty" . . . Before the Commission can nullify a State rate, justification for the "exercise of the federal power must clearly appear" . . . And the intention to interfere with the State's ratemaking function is not to be presumed . . . nor must

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[2]Prior to the Staggers Act, Congress had codified the *Shreveport* doctrine. See 49 U.S.C. sec. 11501(a) (Supp. 1979). The District of Columbia Circuit has ably described the history and requirements of ICC preemption in the pre-Staggers period. *Carolina, C. & O Ry. v. ICC,* 593 F.2d 1305 (D.C. Cir. 1979).

> its intention in this respect be left in serious doubt . . . .
>
> 325 U.S. at 511.
> (Citations omitted)

The Court also held that the ICC may not exercise its *Shreveport* power to supplant State regulation of intrastate carriers "unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." *Id.*[3]

In the decision for which petitioner seeks review, the Court of Appeals held that the *North Carolina* standard does not apply to its review of the ICC's bus preemption decisions.[4] The Court found the ICC's intrastate rail authority reviewed in *North Carolina* to be "considerably different" from the Commission's intrastate bus jurisdiction. Whereas the ICC's rail authority was "limited," exercisable only if the ICC found "unjust discrimination" after investigation and "full hearing," the ICC's bus authority permits "substantial preemption of State regulatory au-

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[3]In response to this argument, the NARUC anticipates that respondents will argue that the *Shreveport* and *North Carolina* decisions are inapposite to the case at bar because they dealt with rail regulation or because they are outdated. Such arguments, if offered, are incorrect. In the *Shreveport* decision, the Supreme Court held that as a matter of *constitutional* law, Congress possessed the power under the Commerce Clause (Art. I, sec. 8, cl. 3, U.S. Const.) to adjust intrastate rail rates to remedy unreasonable interstate commerce. Since 49 U.S.C. § 11501(e) directs the ICC to base its inquiry into intrastate bus matters upon the very same "undue burden" principle, it is clear that Congress has extended the *Shreveport* doctrine to intrastate bus regulation. Therefore, *Shreveport* and its progeny, including *North Carolina*, are fully applicable to this case.

[4]App. A. to Pet. for Cert. at 13a-14a.

thority" to "eliminate . . . burdens on interstate commerce."[5]

The NARUC respectfully submits that by this holding, the Court of Appeals erred. Although there are differences in the statutory procedures applicable to rail and bus preemption, the substantive findings required of the ICC are the same: before it may preempt intrastate bus fare decisions, the ICC must find that the intrastate fare "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce,"[6] the basic *Shreveport* language construed in *North Carolina.* 325 U.S. at 511. Moreover, the reasons offered by the Court of Appeals for Congressional concern in the bus area (subsidization of intrastate fares by higher interstate charges) reflect precisely the same concern discussed by the Court in *North Carolina.* 325 U.S. at 511, 514-515, citing *Florida v. United States,* 292 U.S. 1 (1934) (intrastate traffic must produce its "fair share" of carrier revenue needs). Because of this similarity between bus and rail preemption, there is no persuasive reason why the *North Carolina* standard should not apply to ICC bus decisions under 49 U.S.C. §11501(e).

Therefore, the NARUC respectfully requests that this Court grant the Petition for Certiorari and state explicitly what is now implicit: that the *North Carolina* standard (which this Court never abandoned in the pre-Staggers rail era)[7] is fully applicable to ICC decisions preempting State intrastate bus fare determinations. Unless this Court finds that the ICC must meet a high standard of certainty when it preempts the State ratemaking function, the jurisdiction

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[5] *Id.*

[6] 49 U.S.C. § 11501(e)(1)(B).

[7] *Public Service Commission v. United States,* 356 U.S. 421 (1958).

of each State agency will be diminished as the respective Courts of Appeals uphold Commission decisions under the deferential standards of the Administrative Procedures Act, 5 U.S.C. §706 (1977). As Appendix F to the Petition for Certiorari documents, the ICC has embarked upon a concerted effort to reverse intrastate fare decisions on a grand scale. Unless this Court reaffirms the basic principle of *North Carolina,* this preemption will likely continue.

CONCLUSION

In its *North Carolina* decision, this Court stated that "[i]ntrastate transportation is primarily the concern of the State." 325 U.S. at 511. We respectfully request that the Court grant the Petition for Certiorari and reaffirm the *North Carolina* principle of federalism that ICC decisions interfering with this State concern must be rigorously reviewed to ensure that the use of preemptive federal power is justified.

Respectfully submitted,

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